Supreme Court of the United States

October Term, 1977

No. 77-1165

GARY EVERETT THOMPSON

and

MYRON LESTER TILTON,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR STARK COUNTY, OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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To: The Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

Respondent respectfully submits that there is no substantial federal question which will require this Court to review this case.

The Ohio Courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition. Separately and additionally it is submitted that petitioner has an adequate remedy at law in Ohio. The question of effective assistance of counsel could and should be developed in the State Court through a proceeding in Post-Conviction Relief under Section 2953.21 of the Ohio Revised Code (Appendix p. 9). The nature of the complaint requires a determination of the subjective state of mind of the petitioners as well as other matters outside the record and therefore not amenable to review in certiorari.

COUNTER QUESTIONS OF LAW

1. Does the fact that one of two trial counsel, representing indigent co-defendants in a criminal trial, represented a State's witness before and/or after trial and absent a demonstration of prejudice, per se give rise to denial of effective assistance of counsel.

STATEMENT OF THE CASE

Petitioners were indicted along with others on March 31, 1976 for Aggravated Murder with specifications of Aggravation and Complicity to Aggravated Murder with specifications of Aggravation. The indictments resulted from the arson and resulting explosion at a Massillon, Ohio, restaurant which caused the deaths of three Massillon firemen. Upon arraignment, two attorneys, Harry Schmuck

of Canton, Ohio, and Tom Borcoman, Stark County Public Defender, were appointed to represent the two defendants. Nowhere in the official records or otherwise except in the briefs of petitioner was either attorney styled "chief counsel" or "assistant counsel"

Petitioners waived a jury trial and were tried by a three-judge panel. The waiver was apparently in order to gain severance for two other co-defendants, Louis "Bones" Battista and Joseph Paone, the Trial Court having previously denied a motion for severance.

The trial commenced on June 28, 1976 rather than July 28, 1976 as reflected by petitioner's Statement of Facts. One of the forty witnesses called by the State in its case in chief was George Bevington. In direct examination by the Prosecuting Attorney, Mr. Bevington testified that he was a long-time friend of Fred Dalesandro and that on two successive days prior to the arson fire, he sold gasoline to Dalesandro, which was placed in plastic containers identified as the type used in the arson. He gave no testimony with regard to petitioners Thompson and Tilton, nor any other matters pertaining to the Felony Murder. He was closely cross-examined by Mr. Schmuck as to the reasons given by Dalesandro for obtaining the gasoline and why Dalesandro did not buy it for himself from a dealer. The testimony of Bevington did not go in any way to the part of these petitioners in the crime. Petitioners were found "Guilty" by a unanimous three-judge panel and sentenced to life imprisonment.

Two separate motions for new trial were filed and overruled. Notice of appeal was timely filed to the Court of Appeals, Fifth Appellate District, Stark County, Ohio. A panel of three judges from other districts were assigned to hear the case, but stepped aside after hearing oral argu-

ments, and were replaced by three other visiting judges who affirmed the judgment of conviction (See Appendix to Petition for Writ of Certiorari, p. A1).

A timely notice of appeal was filed to the Supreme Court of Ohio which dismissed the appeal sua sponte by entry dated November 25, 1977. A subsequent motion for reconsideration was overruled under date of November 25, 1977. Petitioners have not raised the claim of effective assistance of counsel through collateral post-conviction proceedings under Section 2953.21 of the Ohio Revised Code or Habeas Corpus.

Petition for Writ of Certiorari was filed on February 16, 1978.

REASONS FOR DENYING THE WRIT

The Fifth District Court of Appeals for Stark County, Ohio, found upon direct appeal of the Petitioners' Judgment of Conviction that:

> "Mr. Schmuck said he informed his clients of his connection with Mr. Bevington."

No relationship between Mr. Bevington and the appellants was ever established (Opinion, App. to Petition, p. A10).

This gives rise to a significant question as to whether the Petitioners might have waived any claim arising out of Attorney Schmuck's representation of witness Bevington. It is also indicative of a finding of a lack of prejudice to the Petitioners. Respondent respectfully submits that these are matters which could be tested to collateral proceedings under Ohio's Post-Conviction Remedy Act, Section 2953.21 O.R.C. or through Habeas Corpus in which the subjective state of mind of the Petitioners, as well as the operable facts could be determined. Thus, the Petitioners have an adequate remedy at law or through other proceedings not calling upon the issuance of an extraordinary writ by this Court.

The Court of Appeals in view of the record and the prior holdings of this and other courts, found that the Petitioners' contention that Mr. Schmuck was attempting to protect the interest of Mr. Bevington as well as those of the Petitioners was not well taken.

Bevington's role in the prosecution, the Court of Appeals noted, was minimal, relating only to the purchase of gasoline by Dalesandro alone (Opinion, App. to Petition, p. A10).

The authorities cited by Petitioners in their Petition do not, in fact, serve to buttress their arguments. To the contrary, they reinforce Respondent's position that the issue of effective assistance of counsel may be properly determined only through a thorough evidentiary hearing in collateral proceeding. Three of the cases cited arose from federal Habeas Corpus proceedings and appeals therefrom. The cases are otherwise distinguishable from ours on substantial grounds. In *Castillo v. Estelle*, 504 F.2d 1243, an appeal from denial of Habeas Corpus Relief, it appears that a witness represented by defense counsel was the victim of the offense charged. In *United States, ex rel. Miller v. Myers*, 53 F. Supp. 55 (E.D. Pa. 1966) the proceedings were also in Habeas Corpus and the defense attorney represented the victim of the crime. In *United States, ex rel. Williamson v. LaVallee*, 282 F. Supp. 968 (E.D. N.Y. 1968) the proceedings were in Habeas Corpus and the entire performance of trial counsel was so inadequate so as to require vacation of the judgment of conviction. The lawyer had first solicited the defendant's representation then failed to talk with him until the trial commenced, offered no witnesses, conducted little cross-examination, and was otherwise totally ineffective. The witness whom he also represented was himself under indictment for a crime. More importantly, the court noted that the fact of the dual representation standing alone did not violate the defendant's right to counsel. The opinion of Justice Stevenson in *United States v. Jeffers*, 520 F.2d 1256 (7th Cir. 1975) reviewed a case in which the trial record included a thorough inquiry into the dual representation issue, including the fact that the trial defendants wanted their counsel relieved because of the conflict. The Court of Appeals nonetheless affirmed the trial court in directing that the trial proceed despite counsel's conflict. Of course, *Glasser v. U. S.*, 315 U.S. 60, 86 L. Ed. 68

involved a situation in which the trial court had ordered defense counsel to represent a co-defendant over the defendant's objection. No such aggravating circumstances appear in the instant case. Mr. Schmuck was, in fact, the choice of Petitioners' Thompson and Tilton and they had the additional representation provided by the Public Defender for Stark County, together with the full investigative facilities available through his office.

The great bulk of conflict of interest through dual representation cases involved joint representation of co-defendants in the same trial. That did occur in the instant case, yet Petitioners raise no objection to this procedure. In either case they make no demonstration of prejudice. This Court certainly could not adopt a Constitutional Rule that dual representation per se requires reversal or vacation of a judgment of conviction. Such a ruling necessarily resting upon the Sixth and Fourteenth Amendments to the Constitution would have national impact. There are undoubtedly areas where the number of lawyers is small and of clients large enough so as to cause such a sweeping mandate to itself, deny the right to counsel. We must also consider impact of such ruling on the Public Defender System. This concept which has at last provided criminal defendants with investigative resources and specialized representation would be emasculated by an inflexible rule that dual representation or apparent conflicts of interest per se deny the right to effective counsel.

The Petitioners should be compelled to develop a record demonstrating prejudice through collateral proceedings.

The Respondent should have the opportunity to negate prejudice in such proceedings. The alternative would have disastrous impact on the criminal justice system.

Section 2953.21 of the Revised Code of Ohio, the Ohio Post-Conviction Remedy Act, is one of the available state remedies as yet not exhausted.

In weighing the effective assistance of counsel, Ohio has rejected the "farce and mockery test" and the standard of "best available practice" and has adopted a standard requiring "reasonably effective assistance", *State v. Lytle*, 48 Ohio St. 2d 391. Counsel's performance in the instant case could be tested by these standards and a sweeping constitutional ruling could thus be avoided.

It is submitted that all of the foregoing constitute substantial reasons why Certiorari should be denied.

CONCLUSION

In light of the foregoing facts and the authorities cited, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

§2953.21 O.R.C.—Petition to vacate or set aside sentence.

(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by the petitioner on the prosecuting attorney. The clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the prosecuting attorney of that county.

(C) Before granting a hearing the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including but not limited to the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript. Such court reporter's transcript if ordered and certified by the court shall be taxed as court costs. If the court dismisses

the petition it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within such further time as the court may fix for good cause shown, the prosecuting attorney shall respond by demurrer, answer, or motion. Within twenty days from the date the issues are made up either party may move for summary judgment as provided in section 2311.041 (2311.04.1) of the Revised Code. A bill of exceptions is not necessary in seeking summary judgment. The right to such judgment must appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues, hold the hearing, and make and file written findings of fact and conclusions of law upon entering judgment thereon.

(F) At any time before the demurrer, answer, or motion is filed, the petitioner may amend his petition with or without leave or prejudice to the proceedings. The petitioner may amend his petition with leave of court at any time thereafter.

(G) If the court finds grounds for granting relief, it shall, by its judgment, vacate and set aside the judgment, and shall, in the case of a prisoner in custody, discharge or resentence him or grant a new trial as may appear appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail.

(H) Upon the filing of a petition pursuant to this section by a prisoner in a penal institution who has received the death penalty the court may stay execution of the judgment challenged by the petition.